



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

BETH NAGUSKY
ACTING COMMISSIONER

MEMORANDUM

DATE: January 6, 2011

TO: The Board of Environmental Protection

FROM: Beth Callahan, Project Manager, Bureau of Land & Water Quality
Dawn Hallowell, Regional Licensing & Compliance Manager, Bureau of Land & Water Quality

RE: David E. Rice Appeal of Natural Resources Protection Act Denial, South Bristol, Lincoln County, #L-23698-4E-B-M

Statutory and Regulatory References: The applicable statutory and regulatory framework for this appeal is the Natural Resources Protection Act (NRPA) § 480-D and Chapter 310 of the Department's Wetlands and Waterbodies Protection Rules. The Wetland and Waterbodies Protection Rules interpret and elaborate on the NRPA criteria. In the sections pertinent to this appeal, Chapter 310 guides the Department in its determination of whether a project's impacts on the coastal wetland would be unreasonable. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2(24)(B).

Location: The project site is located off Clarks Cove Road on the Damariscotta River in the Town of South Bristol.

Procedural History and Project Description: On June 1, 2007, DAVID E. RICE (applicant) filed a NRPA application to construct a 12 foot wide by 110 foot long pile-supported commercial pier with a seasonal ramp and float, an access platform, access stairs with a trap chute, and an equipment shed. In Department Order #L-23698-4E-A-N, dated October 11, 2007, the Department approved the construction of the pier and its associated structures. In that Order, the Department included a condition of approval, Special Condition #5, which states that "No trap storage will be permitted on the permanent pier." This special condition was placed on the Order in an effort to minimize further impacts to the coastal wetland such as shading effects and to minimize potential impacts on the scenic and aesthetic uses of the resource.

On November 9, 2007, a group of interested parties filed a Petition for Review of the Department Order with the Lincoln County Superior Court. While the judicial appeal was pending, the interested parties brought to the Department's attention additional information related to the application analysis that had not been before the Department during its review of the application. On February 25, 2008, the court remanded the matter to allow the record to be re-opened to give the Department the opportunity to consider new information.

After reconsideration of the evidence in the record and comments received, in Department Order #L-23698-4E-A-A, dated September 10, 2008, the Department again approved the project. The Order included the same special condition.

On October 10, 2009, interested parties filed a timely appeal of Department Order #L-23698-4E-A-A to the Board of Environmental Protection (Board). The appellants requested that the Board reverse the decision in the Order and argued points on title, right, or interest; soils; existing scenic, aesthetic, recreational, and navigational uses; and coastal wetland considerations. The applicant did not contest any facts, conclusions, or conditions of the permit during the appeal. In Board Order #L-23698-4E-A-Z, dated April 16, 2009, the Board denied the appeal and affirmed the underlying Order.

On June 24, 2009, the applicant filed a NRPA minor revision application requesting the removal of Special Condition #5 in order to allow the applicant's 600 lobster fishing traps to be stored and repaired on the permitted pier at any time. In Department Order #L-23698-4E-B-M, dated July 15, 2010, the Department denied the application for the minor revision based upon potential unreasonable impacts to the coastal wetland and its determination during the review process that practicable alternative locations for trap storage were available to the applicant.

On August 11, 2010, the applicant filed an appeal of Department Order #L-23698-4E-B-M to the Board.

On July 27, 2010, the Department of Marine Resources (DMR) submitted a letter to the Department altering its previous assessment of potential adverse impacts to the marine habitat at the project site. On September 16, 2010, DMR submitted a second letter that included further details of their new assessment of the project site. On October 7, 2010, the Board Chair ruled to allow this supplemental evidence, along with other responsive materials from interested persons, to be admitted into the record.

Environmental Issues and Discussion: The applicant asserts that the Department's findings and decision were based on an erroneous habitat assessment by DMR. The applicant contends that shading caused by the storage of his traps will not cause an unreasonable impact to the coastal wetland.

During the Department's review of the applicant's original permit application, the Department received comments from DMR regarding potential impacts to the marine environment at the project site from the construction of the commercial pier system. In its comments and following a site visit, DMR stated that shading and subsequent loss of marine vegetation would likely result from the project. Department staff visited the project site several times throughout the review process.

Interested parties, comprised of abutting property owners, expressed several concerns during the review of the original permit application that were in relation to title, right, or interest, scenic, recreation, and navigational uses of the area, soil erosion, and coastal wetland considerations.

Based upon DMR's comments, interested parties' concerns, and given that the storage of traps on the pier could exacerbate potential adverse impacts on the coastal wetland, Special Condition #5 was included in the Order.

During its review of the applicant's minor revision application, the Department again requested comments from DMR regarding potential impacts to the marine environment at the project site that would likely result from the permanent storage of the applicant's lobster fishing traps on the permitted pier. DMR commented that storage of traps would contribute to shading of marine vegetation and would result in deposition of debris onto the intertidal area and surrounding waters from trap maintenance. DMR recommended that the current permit condition prohibiting storage of traps on the permitted pier remain in effect.

Interested parties expressed concern during review of the minor revision application in relation to water dependent use, the availability of alternatives, and potential shading impacts as a result of storage of traps on the permitted pier.

Based largely upon DMR's comments and also the determination that the applicant had reasonable alternative storage locations, the Department determined that the impacts of the applicant's proposal were unreasonable, and the Department denied the applicant's proposal.

Subsequent to the denial of the application, the Department received a letter from DMR, dated July 27, 2010, which stated that the agency erred in its comments to the Department regarding the applicant's proposal. In this letter, DMR retracts its earlier review comments and states that it believes that the storage of the applicant's traps would not result in adverse impacts from shading of nearby marine vegetation. DMR submitted further comments which provided biological studies to support its revised comments. DMR's revised comments are based upon examination of the orientation of the applicant's pier with relation to angles of the sun and the specific type of substrate found at the project site. DMR's opinion is that given the permitted pier's north-south orientation and the nature and abundance of rockweed present at the project site, DMR states that storage of the applicant's traps on the permitted pier would not have a significant adverse impact on the resource.

The Board Chair reviewed the proposed evidence from DMR and allowed this evidence to be admitted into the record. The chair also allowed interested persons to respond to DMR's letters.

Interested persons submitted letters in response to the appeal and the new comments submitted by DMR. They state that the applicant's proposal will negatively contribute to potential resource impacts over time and significantly harm the natural functions and values of the coastal wetland.

Department Recommendation: The Department has re-considered all of the evidence in the record, the arguments submitted by the applicant and interested persons, and the new information provided by DMR. The Department now recommends that the Board approve the minor revision application of David E. Rice which requests removal of Special Condition #5 from Department Order #L-23698-4E-A-N reverse the Department's decision in Department Order #L-23698-4E-B-M, and grant the applicant's appeal.

Estimated Time of Presentation: 2 hours